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In The

# Supreme Court of the United States

October Term, 1997

GREATER NEW ORLEANS EXPRESSWAY COMMISSION; DAVID HURSTELL; AND JAMES DIGBY,

*Petitioners,*

versus

ROBERT G. PENDERGRASS,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Fifth Circuit Court Of Appeals**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Are Causeway Police officers entitled to the same immunities afforded to state troopers, in light of the facts that they are commissioned by the Louisiana State Troopers, acting on behalf of the Louisiana State Troopers, and patrolling portions of the Louisiana State Highway System?

2. Is the Greater New Orleans Expressway Commission an arm of the State of Louisiana, in light of the facts that it operates, manages and patrols, on behalf of the state and as part of the state highway system, the 26-mile bridge, known as "the Causeway", across Lake Pontchartrain?

## LIST OF PARTIES

The petitioners before this Court are the Greater New Orleans Expressway Commission ("GNOEC"), David Hurstell and James Digby. GNOEC is an agency created to operate and maintain the Causeway Bridge, which is a 26-mile span of the Louisiana State Highway System. Hurstell and Digby are Causeway Police officers, employed by GNOEC and commissioned by the Office of State Police and the Louisiana State Department of Public Safety and Corrections to patrol portions of the Louisiana State Highway System.

The respondent is Robert G. Pendergrass, a motorist who was arrested by Hurstell and Digby for speeding and driving while intoxicated on the Causeway Bridge. Pendergrass filed suit in federal court, alleging violation of his civil rights, as well as state law claims.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... i

LIST OF PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... iv

CITATIONS OF OPINIONS BELOW ..... 1

STATEMENT OF JURISDICTION ..... 1

FEDERAL CONSTITUTIONAL PROVISIONS ..... 2

LOUISIANA CONSTITUTIONAL PROVISIONS AND LEGISLATION ..... 2

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING WRIT ..... 10

I. The Fifth Circuit's decision to deny Eleventh Amendment immunity to GNOEC and its police officers conflicts with decisions involving the same issue in the Seventh Circuit .... 10

II. The Fifth Circuit's reliance on the size of a potential judgment to determine Eleventh Amendment immunity conflicts with the Fourth Circuit and decisions of this Court ... 16

CONCLUSION ..... 21

CONTENTS OF APPENDIX ..... ia

## TABLE OF AUTHORITIES

Page

CASES

*Hess v. Port Authority Trans-Hudson*, 513 U.S. 30, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994) ..... 19

*Jacintoport Corp. v. Greater Baton Rouge Port Commission*, 762 F.2d 435 (5th Cir. 1985).....16, 17

*Jensen v. State Board of Tax Commissioners*, 763 F.2d 272 (7th Cir. 1985).....14, 15

*McCurdy v. Sheriff of Madison County*, 128 F.3d 1144 (7th Cir. 1997)..... 13

*Paschal v. Jackson*, 936 F.2d 940 (7th Cir. 1991)..... 13

*Pendergrass v. Greater New Orleans Expressway Commission*, 144 F.3d 342 (5th Cir. 1998) ...10, 11, 13, 16, 20

*Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) ....13, 15

*Regents of the University of California v. Doe*, 519 U.S. 425, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997)..... 18

*Ristow v. South Carolina Ports Authority*, 58 F.3d 1952 (4th Cir.), *cert. denied*, 516 U.S. 987, 116 S.Ct. 514, 133 L.Ed.2d 423 (1995).....19, 20

*Ruehman v. Sheahan*, 34 F.3d 525 (7th Cir. 1994)...13, 14

*Scott v. O'Grady*, 975 F.2d 366 (7th Cir. 1992).....14, 15

CONSTITUTIONAL ARTICLES AND STATUTES

1986 La. Acts 762.....2, 4, 5, 6, 11

1988 La. Acts 875.....2, 6, 7, 8, 11

1997 La. Acts 775.....2, 8, 11

28 U.S.C. § 1254(1) ..... 1

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1331 ..... 2

28 U.S.C. § 1343 ..... 2

La. R.S. 24:651 *et seq.* ..... 6

La. R.S. 32:57(G) ..... 8, 11

Louisiana Constitution of 1921, article VI, § 22 ..... 2, 3

United States Constitution, Amendment XI ..... *passim*

## PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

Petitioners, GNOEC, Hurstell and Digby, respectfully pray that a writ of certiorari issue to review the decision by the United States Court of Appeals for the Fifth Circuit to deny Eleventh Amendment immunity to GNOEC and its police officers, entered in this action on June 18, 1998.

## CITATIONS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 144 F.3d 342. The judgment and reasons of the United States Eastern District Court for the State of Louisiana are not published, but can be found on Westlaw at 1997 WL 187387 and in the appendix attached hereto.

## STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit, denying GNOEC's assertion of Eleventh Amendment immunity, entered on June 18, 1998.

## FEDERAL CONSTITUTIONAL PROVISIONS

**United States Constitution, Amendment XI.**

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

## LOUISIANA CONSTITUTIONAL PROVISIONS AND LEGISLATION

Louisiana Constitution of 1921, article VI, § 22 Appendix, p. 26a

1986 La. Acts 762.....Appendix, p. 32a

1988 La. Acts 875.....Appendix, p. 45a

1997 La. Acts 775 (amending La. R.S. 32: 57(G)) Appendix, p. 52a

## STATEMENT OF THE CASE

Robert G. Pendergrass, plaintiff/respondent herein, filed this civil rights suit and related state law claims pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3). Greater New Orleans Expressway Commission, David Hurstell, and James Digby, defendants/petitioners herein (collectively referred to herein as "GNOEC"), asserted that they were immune from suit in federal court, based on the Eleventh Amendment of the United States Constitution. GNOEC also argued that, as an arm of the state, it

was not a "person" under the Civil Rights Act. GNOEC filed a motion for summary judgment, with supporting affidavits and documentation, seeking dismissal of Pendergrass' suit on those grounds. The district court denied that motion on April 15, 1997. The United States Court of Appeals for the Fifth Circuit affirmed that decision in an opinion entered on June 18, 1998. GNOEC now petitions for a writ of certiorari to review the Fifth Circuit decision.

Historically, GNOEC began as a bi-parish entity with state ties, and evolved into its present form as a state entity, operating under little to no parish control. The State of Louisiana authorized the creation of GNOEC in 1952 by amending its state constitution to permit the Parishes of Jefferson and St. Tammany to form a corporation which would construct, maintain, and operate the Causeway Bridge as the only part of the state highway system to connect the north and south shores of Lake Pontchartrain. *See* Louisiana Constitution of 1921, article VI, § 22(5).[1] In 1954, Jefferson and St. Tammany Parishes created GNOEC pursuant to that constitutional authority. Using State Highway Fund No. 2 monies and $46,000,000 of state-authorized bond monies, GNOEC began construction of the Causeway Bridge in 1955, and completed the bridge in 1956. In the mid-sixties, the GNOEC built a second span parallel to the first bridge, with funding similar to the formula used for the first construction. That span opened in 1969. The Louisiana enabling legislation and state constitution clearly state that the Causeway Bridge is part of the state highway system.

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[1] The Louisiana Constitution of 1921 was superseded by the Louisiana Constitution of 1974.

Because the Causeway Bridge is part of the state highway system, the state police are responsible for patrolling that bridge, as well as the Huey P. Long Bridge, which crosses the Mississippi River in Jefferson Parish. To fulfill that responsibility, the Louisiana Office of State Police directly commissions the GNOEC police to act as its official representatives and to exercise its authority on those portions of the state highway system. The Causeway police are commissioned exclusively by the Office of State Police and the State Department of Public Safety and Corrections, and derive no authority from any local law enforcement departments. The authority of the GNOEC police to arrest citizens, including the authority which they exercised in the instant case to arrest Mr. Pendergrass for speeding and driving while intoxicated, flows directly from the state, not the local parishes. In effect, Mr. Pendergrass was arrested by the state, for violating state law, on a state highway. Thus, **a judicial determination regarding the propriety of the conduct of the GNOEC police is functionally equivalent to passing judgment on the conduct of the state police and the State Department of Public Safety and Corrections which commissions the GNOEC officers.**

In 1986, the Louisiana State Legislature, with the approval of the governor, passed Act 762, transforming the fundamental character of GNOEC from a local to state entity on several levels by substantially increasing the state's role in GNOEC's administration. *See* Act 762, p. 32a, *infra*. For the first time in GNOEC's history, the state restricted the amount of bonds which GNOEC could issue for new construction, and specified the projects, with estimated costs, for which those bonds could be

issued. *See* Act 762, Section 2, pp. 34a-36a, *infra*. Second, Act 762 provided that payment of the bonds would be supplemented by State Highway Fund No. 2 monies. *See* Act 762, Section 4, p. 37a, *infra*. The State further agreed in Act 762 to dedicate State Highway Fund No. 2 monies to secure the payment of the bonds until all bonds of the commission (as authorized by Act 762) are paid. *Id*. Thus, if GNOEC ever had to pay a large, civil judgment, and as a consequence, could not meet its bond obligations, then the State would be called upon to repay bonds and interest to the bondholders, pursuant to its indentured agreement which secures the bond indebtedness with State Highway Fund No. 2 monies.

Third, and perhaps most significantly, Act 762 required GNOEC to **transfer any surplus revenues remaining at the end of each fiscal year to the state treasurer**, for deposit in the state treasury. *Id*. at 38a, *infra*. From 1986 to July 1996, when GNOEC filed its motion for summary judgment with the district court in this action, GNOEC has transferred $10,773,269, pursuant to this requirement. **Any direct impact on GNOEC's funds has an equal impact on the state treasury.** If GNOEC pays $100,000.00 in a personal injury lawsuit, then it has $100,000.00 less surplus at the end of that fiscal year to transfer to the state treasury, as it is required to do.

In addition to increasing the state's control over GNOEC's finances, Act 762 gave the state influence over GNOEC's political make-up and administration by changing the method of appointing its commissioners. *See* Act 762, Section 11, pp. 42a-43a, *infra*. Under Act 762, the Louisiana governor appointed two of the five GNOEC commissioners. Previously, the parishes had appointed

two commissioners each and alternated the appointment of the fifth commissioner without any participation by the governor.

Finally, Act 762 required for the first time that GNOEC submit a proposed copy of its annual budget, prior to adoption, to the Joint Legislative Committee on the Budget for review and approval. *See* Act 762, Section 12, p. 43a, *infra*. This requisite is consistent with the type of budgetary supervision traditionally reserved only for state agencies, and never exercised over local political subdivisions. *See* La. R.S. 24:651 *et seq.*

In 1988, the Louisiana State Legislature promulgated Act 875, which amended Sections 2, 4, and 11 of 1986 La. Acts 762, to increase further the State's control and involvement in GNOEC's activities. *See* p. 45a, *infra*. Section 2, which had authorized a limited amount of bonds and specified the projects which would be funded with those bond monies, was amended to add the following state supervisory requirement to those same projects:

> **that the expenditure of any such bond proceeds shall require the prior approval of the House and Senate Committees on Transportation, Highways and Public Works, and the Joint Legislative Committee on the Budget.**

*See* Act 875, p. 46a, *infra*. This section of the amendment also added the same proviso of state legislative approval to GNOEC's use of additional funds for bridge crossovers, or issuance of bonds for other improvements. *Id.* at 48a, *infra*.

Act 875 further enhanced GNOEC's status as a state entity by declaring that its proposed contracts and bonds to be issued after the effective date of Act 875 **"shall be subject to the same oversight provisions as are required of *agency rules* and regulations under the provisions of the Louisiana Administrative Procedure Act and no such contract shall be entered into without such oversight and approval."** Acts 875, Section 2(B) p. 48a, *infra* (emphasis added). Subparagraph B places GNOEC squarely among state agencies in terms of administering contracts and bonds. These rules and regulations of the Louisiana Administrative Procedure Act are not applicable to political subdivisions, further indicating that Louisiana treats GNOEC as an arm of the state.

Next, Act 875 empowered the Louisiana State Legislature with complete control over GNOEC's operating budget by requiring GNOEC to submit its annual operating budget to the Joint Legislative Committee on the Budget **"for its approval or rejection prior to any expenditure of funds contained in such budget."** Acts 875, Section 2(C) p. 48a, *infra* (emphasis added). Importantly, **neither of the parishes which incorporated GNOEC are given any input or authority to approve or reject GNOEC's budget.** Moreover, GNOEC cannot act independently if it does not obtain state approval of its budget. GNOEC's budget, and hence, its operations, are under the exclusive control of the Louisiana state legislature.

Finally, Act 875 further reduced GNOEC's political independence by amending 1986 La. Acts 762, Section 11, which governs the appointments of the commission members. The 1988 act increased the number of the governor's

appointees to include the fifth commissioner; decreased the five-year terms to two-year terms; and, instituted a limitation of two consecutive terms on all members. *See* Act 875, pp. 50a-51a, *infra*. By giving the governor appointment power over a majority of the commissioners, and the opportunity to change the members during a single gubernatorial (4-year) term, the 1988 act further increased the state's political power over the GNOEC.

In 1997, the Louisiana state legislature passed Act 775, which addresses traffic citations issued by the Causeway Police.[2] La. R.S. 32:57(G), governing penalties for traffic citations issued by GNOEC police, was amended by Act 775 to provide that all penalties paid in connection with a citation for a motor vehicle offense on the Huey P. Long Bridge or the Lake Pontchartrain Causeway Bridge shall include an additional cost of five ($5.00) dollars **to be deposited into the state treasury's general fund**. As previously noted, the Causeway Police patrol these two spans on behalf of the state police, pursuant to their commissions as state police. The statute also provides for the creation of a special fund, known as the "Greater New Orleans Expressway Commission Additional Cost Fund." The monies in that fund are controlled by the legislature

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[2] This legislation had not yet passed when the district court considered GNOEC's motion for summary judgment. Therefore, it was not attached to GNOEC'S memorandum. GNOEC respectfully submits that this Court may consider the new legislation because it constitutes a change in the law, and is not new "evidence". Nevertheless, even if this Court does not consider the 1997 legislation, GNOEC maintains that it should have been accorded Eleventh Amendment immunity under the previous law.

and used to supplement the salaries of GNOEC's officers, and for the acquisition or upkeep of police equipment. Importantly, this law provides that **the monies in this fund shall be invested by the state treasurer in the same manner as the monies in the state general fund.** This most recent legislation further binds the GNOEC to the state treasury, and enhances the state's control over GNOEC's finances.

In summary, GNOEC and the Causeway Police are an arm of the State of Louisiana and entitled to the same treatment and immunities as the state, particularly in a case involving the conduct of the Causeway Police, for the following reasons: (1) Causeway Police act with the authority and on behalf of the Office of State Police and Department of Public Safety and Permits; (2) GNOEC contributes directly to the state treasury; (3) the state secures GNOEC's bonds and supplements their repayment with the State Highway Fund No. 2 monies; (4) the state relies on GNOEC to perform state functions under the State's supervision and authority; (5) the state exercises absolute control over GNOEC's operating budget; and (6) the state governor appoints the majority of GNOEC's commissioners.

## REASONS FOR GRANTING WRIT

### I. The Fifth Circuit's decision to deny Eleventh Amendment immunity to GNOEC and its police officers conflicts with decisions involving the same issue in the Seventh Circuit.

This Civil Rights suit involves the conduct of police officers who were commissioned by the Office of State Police and the Louisiana Department of Public Safety and Permits. The sole purpose of their commission was to act on behalf of the State of Louisiana – in the stead of Louisiana State Troopers – to patrol the Causeway Bridge as part of the State Highway System. Under these circumstances alone, without even considering the strong financial and administrative ties between Louisiana and GNOEC, the state's Eleventh Amendment immunity should flow to GNOEC and the Causeway Police through the police commissions issued by the Office of State Police and the Louisiana Department of Public Safety and Permits.

In deciding the immunity issue in the instant case, the Fifth Circuit did not even consider the source of the Causeway Police's authority. Instead, the court mechanically applied its six-factor test, focusing primarily on the fact that a judgment against GNOEC *in this case* would not be paid by the state treasury. *Pendergrass v. Greater New Orleans Expressway Commission*, 144 F.3d 342 (5th Cir. 1998). Under the first factor (state law), the Fifth Circuit failed to consider the 1986, 1988, and 1997 legislative acts recognizing the role of the Causeway Police in patrolling portions of the State Highway System, and imposing duties typically reserved for state agencies. Under the

second factor (source of funds), the Fifth Circuit brushed aside the facts that GNOEC *and now, the Causeway Police,* contribute regularly to the state treasury,[3] and that the Causeway Police are paid out of the surplus which is destined for the state treasury.

The source of the Causeway Police's authority, *i.e.,* special police commissions issued by the Office of State Police and Louisiana Department of Public Safety and Permits, should have been the paramount indicia in weighing the third factor of the Fifth Circuit test – local autonomy of the entity. At this juncture, the court should have concluded that GNOEC is powerless to commission its own police force. Moreover, the parishes have conferred no authority and exercise absolutely no control over the Causeway Police. The Causeway Police exist only by virtue of the fact that the State of Louisiana has deemed it necessary to create this extension of the Louisiana State Troopers to act on its behalf in patrolling two major bridges of the State Highway System. Instead of recognizing this explicit lack of autonomy (in addition to GNOEC's lack of autonomy over its operating budget, expenditures, and administration of contracts and bonds), the Fifth Circuit mired the issue by scrutinizing the minutia which limit the governor's appointment power over three of the GNOEC commissioners. *Pendergrass,* 144 F.3d at 347.

Similarly, the fourth factor, addressing an entity's purpose and concern with state-wide problems, cries out

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[3] *See* 1986 La. Act 762, Section 4; 1988 La. Act 875, Section 4; 1997 La. Act 775, amending La. R.S. 32:57(G); pp. 38a, 49a-50a, 52a, *infra.*

in this case for recognition that the Causeway Police are performing the jobs of the Louisiana State Troopers by virtue of the state's grant of authority, in addition to the fact that GNOEC has built and maintained a major artery of the State Highway System. Neither the enabling state constitutional provision nor any other type of legislation charges GNOEC or the parishes with the responsibility of patrolling the Causeway Bridge (or the Huey P. Long Bridge). This obligation rests squarely with the State of Louisiana, which is solely responsible for policing all of its state highways. The state has elected to fulfill that responsibility by commissioning the Causeway Police through the Office of State Police and the Louisiana Department of Public Safety and Permits to act on behalf of the state and patrol the Causeway and Huey P. Long Bridges. Therefore, the sole purpose and concern of the Causeway Police is to perform a state function: patrol portions of the State Highway System. Once again, the Fifth Circuit missed the bigger picture, and concluded that the 26-mile, state-highway bridge across Lake Pontchartrain was simply a local concern because it links and serves primarily three parishes. *Id.*

The fifth and sixth factors of the Fifth Circuit test (the power to sue and be sued, and the right to hold and use property) really have no relevance to the particular issue of whether the state's Eleventh Amendment immunity flows from the Office of State Police and the Louisiana Department of Public Safety and Permits to the Causeway Police through the special police commissions issued by the state. At the most, these factors should be considered neutral because many Louisiana state agencies have the power to sue and be sued, and the right to hold and

use property without surrendering their status as an arm of the state. Nevertheless, the Fifth Circuit summarily held that these factors weighed against Eleventh Amendment immunity. 144 F.3d at 347.

The Fifth Circuit's refusal to extend Eleventh Amendment immunity to police officers who act on behalf of the state or a state agency sharply conflicts with decisions of the United States Court of Appeals for the Seventh Circuit. In *McCurdy v. Sheriff of Madison County*, 128 F.3d 1144 (7th Cir. 1997), the Seventh Circuit held that a county sheriff, who was acting as an agent of the state court system by serving an arrest warrant, "was a part of state government rather than county government *when serving the state court's warrant.*" *Id.* at 1146 (emphasis added). The Seventh Circuit expressly rejected the notion that action by the state is limited to action by employees of the state. *Id.*

In *Ruehman v. Sheahan*, 34 F.3d 525 (7th Cir. 1994), the Seventh Circuit outlined the policy and rationale for distinguishing between a county sheriff acting on behalf of the county (which is not protected by the Eleventh Amendment) and a county sheriff acting on behalf of the state or a state agency (which is protected by the Eleventh Amendment). Notably, the court declined to rely exclusively on the issue of who would pay the judgment if the sheriff lost, explaining:

> The constitutional question is whether the suit is against a state. See *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101, 104 S.Ct. 900, 908-909, 79 L.Ed.2d 67 (1984). A drain on the state treasury is not a necessary condition of an affirmative answer. *Paschal v. Jackson*, 936 F.2d

940 (7th Cir. 1991); *Jensen v. State Board of Tax Commissioners*, 763 F.2d 272 (7th Cir. 1985).

> Under Illinois law, a sheriff is the chief law enforcement official of each county and there is not a state officer. . . . But a sheriff does not serve the county alone. He also follows orders from state courts. When he does so, we recognized in *Scott v. O'Grady*, 975 F.2d 366 (7th Cir. 1992), he acts as a state officer, and a suit protesting his activities is a suit against the state. ***Any other approach would allow a federal court to frustrate the achievement of state policy.*** *Id.* at 371. A state acts only through agents, and at times a sheriff plays this role for Illinois.

*Ruehman*, 34 F.3d at 528 (emphasis added) (citations omitted). Certainly, if a sheriff, whose chief source of authority derives from the county, can be considered an agent of the state, then a police officer, whose sole commission is issued by the Office of State Police and the Louisiana Department of Public Safety and Permits, is an agent of the state when arresting a motorist on a state highway for violating state law.

Thus, in *Scott v. O'Grady*, 975 F.2d 366 (7th Cir. 1992), a county sheriff and his deputy were afforded Eleventh Amendment immunity because they were not acting as county officials when evicting tenants pursuant to a state court order. Although sheriffs are classified as county officials under Illinois law, and the county had agreed to indemnify the state from any potential damages, the Seventh Circuit held that the sheriff and deputy were arms of the state, explaining:

> A state can be the "real, substantial party in interest" even if its treasury will remain

> untouched: "The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, **or interfere with the public administration,** or if the effect of the judgment would be to restrain the Government from acting or to compel it to act" *Pennhurst*, 465 U.S. at 101 n. 11, 104 S.Ct. at 908 n. 11 (emphasis added); *see also Jensen*, 763 F.2d at 277 (to determine whether the state is the real party in interest, "we are required to evaluate more generally whether a suit would interfere with public administration, or otherwise restrain or compel government action").

*Scott*, 975 F.2d at 372. The court then held that the defendants were acting as state officials, and therefore, were entitled to Eleventh Amendment immunity. To hold otherwise would have resulted in the federal court interfering with the public administration of the state where the state had delegated its functions to persons and/or entities acting on its behalf.

If the district court judgment in the instant case had been appealed to the Seventh Circuit, plaintiff's suit against the Causeway Police officers and GNOEC would have been dismissed based on the Eleventh Amendment. Apparently, the Fifth Circuit refuses to recognize that a defendant is an arm of the state whenever that defendant acts on behalf of the state or with state authority, even though the judgment will not be paid out of the state treasury. Because of the inconsistent results produced by these divergent applications of the Eleventh Amendment, this Honorable Court should grant writs to resolve this conflict between the Fifth and Seventh Circuits.

## II. The Fifth Circuit's reliance on the size of a potential judgment to determine Eleventh Amendment immunity conflicts with the Fourth Circuit and decisions of this Court.

The Fifth Circuit's "six-factor test" to determine Eleventh Amendment immunity is purely a charade. The only true determining factor used by the Fifth Circuit in the instant case is whether the state treasurer will have to write a check from the state treasury to pay *this* judgment in *this* case. In its opinion in the instant case, the Fifth Circuit stated:

> Any judgment rendered in this case would not be paid out of the state treasury but by the GNOEC through either its insurers or its self insurance fund. Accordingly, this factor weighs heavily against classifying the GNOEC as an arm of the state or permitting it to invoke Eleventh Amendment immunity. *Cf. Jacintoport Corp.*, 762 F.2d at 440-42.

*Pendergrass*, 144 F.3d at 346.

The Fifth Circuit relied even more blatantly on the actual dollar amount of a potential judgment to determine Eleventh Amendment immunity in *Jacintoport Corp. v. Greater Baton Rouge Port Commission*, 762 F.2d 435, 441 (5th Cir. 1985), in which the court rationalized:

> On the record before us, it appears that any judgment obtained by Jacintoport can be satisfied by the Commission itself. The trial court considered the issue of damages ripe for resolution, but declined to address the matter because of concerns over Eleventh Amendment immunity. On appeal, we have the benefit of the trial court's record. That record shows that even the

> most favorable estimation of Jacintoport's monetary damages does not reach a tenth of the Commission's surplus revenue in a "good year" – of which it has had several recently. The State of Louisiana will not incur liability on this judgment's account. **We specifically decline to reach the question of this Commission's immunity in an instance where the size and nature of the judgment sought would clearly result in liability for the state.**

*Jacintoport*, 762 F.2d at 441 (emphasis added).

If this approach is correct, then this Court should grant writs to announce this simplistic litmus test to the other circuits (as well as litigants in the Fifth Circuit), and save the lower courts and litigants a lot of time and effort currently being spent in analyzing the true nature and character of an entity to determine whether it is an arm of the state. Moreover, plaintiffs could then have the convenient option to circumvent the Eleventh Amendment by either pleading or stipulating that they will not seek damages in excess of an entity's assets and revenues!

Hypothetically, the instant case could have involved the alleged injuries of a busload of fifty (50) unruly, yet athletically-superior, out-of-state college football players, on their way to the national championship in the Sugar Bowl. Assume further that all members of this dream team (which were predominantly senior classmen, about to graduate Magna Cum Laude) had brilliant professional football careers awaiting them immediately upon graduation, complete with six-figure signing bonuses and multi-million dollar annual contracts and endorsements. Finally, assume that the *size of the potential judgment*

against GNOEC for these injuries and future lost incomes far-exceeded its ability to pay, and that the State of Louisiana would have to step in and pay the balance of the judgment, along with GNOEC's bonds, which GNOEC could no longer pay and that the state had secured in 1986 with the State Highway Fund No. 2 monies. Would GNOEC suddenly become "an arm of the state" because the state would have to cough up money from its treasury as a direct result of the potential judgment in this hypothetical? If GNOEC did assume "arm of the state status" from that hypothetical, would it retain that status under principles of *stare decisis*, or would it revert to its unprotected status in the face of a smaller claim?[4]

GNOEC respectfully submits that this Honorable Court should grant writs to announce that the Fifth Circuit's consideration of the ***size of a potential judgment*** in a specific case subverts the purpose of the Eleventh Amendment, and creates uncertainty as to an entity's Eleventh Amendment status when a larger potential judgment looms into view. Moreover, the Fifth Circuit's "size of the judgment test" (notwithstanding its recitation of a six-factor test) conflicts with the Fourth Circuit and its interpretation of decisions by this Court, and this Honorable Court should grant writs to resolve this conflict.

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[4] An analysis which allows the status of an entity to fluctuate conflicts with this Court's decision in *Regents of the University of California v. Doe*, 519 U.S. 425, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997), which held that the university did not lose its Eleventh Amendment immunity despite the fact that the federal government agreed to indemnify it for all costs of the litigation and potential judgments.

In *Ristow v. South Carolina Ports Authority*, 58 F.3d 1952 (4th Cir.), *cert. denied*, 516 U.S. 987, 116 S.Ct. 514, 133 L.Ed.2d 423 (1995), the Fourth Circuit reexamined the status of the South Carolina Ports Authority after this Court remanded that case for reconsideration under the principles announced in *Hess v. Port Authority Trans-Hudson*, 513 U.S. 30, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994). Applying *Hess*, the Fourth Circuit concluded that the ***practical effect*** on the state treasury from a judgment against the Ports Authority warranted application of the Eleventh Amendment.

The South Carolina Ports Authority does not receive operating funds from the state, nor is the state liable for its judgments. According to the Fourth Circuit, "The only clear source of money from which a judgment would legally be required to be paid is the revenue retained by the Ports Authority in its bank accounts, . . . or funds borrowed by the Ports Authority. . . . " 58 F.3d at 1053 (citations omitted). However, the Fourth Circuit examined the *practical effect* of a potential judgment on the state treasury, and found that the state has withdrawn over $1.5 million from the Ports Authority, pursuant to legislation that requires the Ports Authority to turn over its net profits or surplus to the General Assembly.[5]

Although a judgment would not be enforceable against the state, the court explained the implications on the state treasury as follows:

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[5] GNOEC's contribution of its surplus – over $10 million dollars in ten (10) years – to Louisiana's treasury certainly would have tipped the scales in favor of Eleventh Amendment immunity, if the Fourth Circuit had decided GNOEC's appeal.

> Obviously, the legislature will not be able to withdraw net revenues "not necessary or desirable for operation" [*i.e.*, surplus] if the Ports Authority's operational funds have been depleted by judgments against it. Likewise, to the extent that a judgment would deplete its resources, the Ports Authority would be unable to utilize earnings for necessary capital improvements, and so would continue to depend on the state treasury for these required expenditures. **To deny Eleventh Amendment immunity in these circumstances would ignore economic reality.**

*Ristow*, 58 F.3d at 1054 (emphasis added).

Likewise, in the instant case, where GNOEC has contributed to Louisiana's treasury seven-fold the amount of surplus as the Ports Authority did, in one-fifth the amount of time, to deny GNOEC Eleventh Amendment immunity because its liability "would be too indirect and remote"[6] ignores economic reality. This Honorable Court should grant writs in this case to resolve the conflict between the Fifth Circuit, which compares the potential dollar judgment of a specific case against the entity's resources, and the Fourth Circuit, which evaluates the practical effect a judgment will have on the state treasury, based on the ongoing relationship between the state and its entity.

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[6] *Pendergrass*, 144 F.3d at 346.

## CONCLUSION

In conclusion, this Honorable Court should grant writs in the instant case to resolve the conflicts within the federal circuits created by the Fifth Circuit decision below. In the instant case, the Fifth Circuit conflicts with the Seventh Circuit by refusing to recognize that Eleventh Amendment immunity follows the state's authority to protect entities and persons acting on behalf of the state, such as the Causeway Police and GNOEC. Moreover, the Fifth Circuit's decision in the instant case conflicts with decisions in the Fourth Circuit and this Court by allowing the Eleventh Amendment protection to depend upon the size of a potential judgment, rather than the nature of the entity and its relationship to the state.

Respectfully submitted,

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## CONTENTS OF APPENDIX

Page

*Pendergrass v. Greater New Orleans Expressway Commission*, 144 F.3d 342 (5th Cir. 1998)..... 1a

*Pendergrass v. Greater New Orleans Expressway Commission*, CA 95-1154 (E.D. La. 4/16/97) ..... 14a

Louisiana Constitution of 1921, Article VI, § 22 (5) ... 26a

1986 La. Acts 762..... 32a

1988 La. Acts 875..... 45a

1997 La. Acts 775 (amending La. R.S. 32:57(G))..... 52a

**Robert G. PENDERGRASS, Plaintiff-Appellee,**

**v.**

**THE GREATER NEW ORLEANS EXPRESSWAY COMMISSION, David Hurstell, and James Digby, Defendants-Appellants.**

**No. 97-30463.**

United States Court of Appeals,
Fifth Circuit.

June 18, 1998.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BARKSDALE, BENAVIDES and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

The plaintiff-appellee, Robert G. Pendergrass, brought this suit for monetary damages under 42 U.S.C. § 1983 against the defendants-appellants, the Greater New Orleans Expressway Commission (GNOEC) and its police officer employees, David Hurstell and James Digby, alleging that the officers had violated his Fourth Amendment rights by using excessive force on him during an arrest. The GNOEC and its officers moved for summary judgment and/or a dismissal for lack of subject matter jurisdiction alleging (1) that the GNOEC was immune from this suit under the Eleventh Amendment because of its status as an agency or arm of the state, and, in the alternative, (2) that the officers involved were not "persons" under § 1983. The district court denied the motion. The defendants appealed. We affirm.

## Factual Background

On July 29, 1994, Robert Pendergrass, the plaintiff, was exiting the Causeway Bridge in Metairie, Louisiana, on his way to New Orleans when he was stopped for speeding by two GNOEC police officers, the defendants David Hurstell and James Digby. After the stop, the officers arrested Pendergrass for speeding and driving while intoxicated and handcuffed him. The officers allegedly used excessive and unnecessary force, striking Pendergrass's head, pushing him to the ground and pulling him up with the handcuffs. Pendergrass allegedly sustained severe and disabling injuries requiring two surgical procedures as a result.

## Analysis

The Eleventh Amendment to the United States Constitution provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Adopted in order to override Chisholm v. Georgia, 2 Dall. 419, 1 L.Ed. 440 (1793), the Eleventh Amendment confirms the States' role in our federal system as separate sovereigns which may not be sued in the court of another sovereign, i.e. the federal government, or their own courts absent consent or, in certain circumstances, congressional abrogation of sovereign immunity. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54-56, 116 S.Ct. 1114, 1122-24, 134 L.Ed.2d 252 (1996); see also

Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146, 113 S.Ct. 684, 688-89, 121 L.Ed.2d 605 (1993) ("The [Eleventh] Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity."). In addition to barring suits by citizens of one state against another state in federal court, the Eleventh Amendment also "bars suits in federal court by citizens of a state against their own state or a state agency or department." Voisin's Oyster House, Inc. v. Guidry, 799 F.2d 183, 185 (5th Cir.1986); Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). It is well settled that even though a state is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment if the state is the real, substantial party in interest because the suit seeks to impose a liability which must be paid from public funds in the state treasury. Edelman v. Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662 (1974); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464, 65 S.Ct. 347, 350-51, 89 L.Ed. 389 (1945).

Accordingly, we must determine whether the GNOEC is "an arm of the state enjoying eleventh amendment immunity or whether it possesses an identity sufficiently distinct from that of the State of Louisiana to place it beyond that shield." Minton v. St. Bernard Parish Sch. Bd., 803 F.2d 129, 131 (5th Cir.1986). This court has held that, in deciding whether a named defendant is entitled to Eleventh Amendment immunity as an "arm of the state," "we 'must examine the particular entity in question and its powers and characteristics as created by state law. . . . ' " Clark v. Tarrant County, Texas, 798 F.2d 736, 744 (5th Cir.1986) (quoting Laje v. R.E. Thomason General

Hosp., 665 F.2d 724. 727 (5th Cir.1982)). The relevant factors include: "(1) whether the state statutes and case law characterize the agency as an arm of the state; (2) the source of the funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property." Minton, 803 F.2d at 131; see also Delahoussaye v. City of New Iberia, 937 F.2d 144, 147 (5th Cir.1991).

Applying the relevant factors, we conclude that the GNOEC is not an arm of the state and, therefore, is not shielded by the state's Eleventh Amendment immunity.

(1) The relevant statutes and case law characterize the GNOEC as a local entity and not an arm of the state.

The statutes pertaining to the GNOEC characterize it as a local or interparish entity. The GNOEC was created as a public corporation in 1954 by the parishes of Jefferson and St. Tammany for the purpose of building and operating a toll causeway over Lake Pontchartrain as a direct vehicular transportation link between the two parishes. The two parishes established the GNOEC as their own instrumentality under the authority of the Local Services Law, La.R.S. 33:1321 et seq., which empowers any combination of parishes to agree to jointly construct, acquire or improve any public project, including causeways, bridges, highway facilities and other means of public transportation. La.R.S. 33:1324. The GNOEC articles of incorporation provide that it is an agency and

instrumentality of the parishes of Jefferson and St. Tammany. Article VI § 22(g)(5) of the 1921 Louisiana Constitution was also added in 1952 to confer the necessary authority on the parishes of Jefferson and St. Tammany to construct, maintain and operate the causeway and issue revenue bonds for that purpose. However, that constitutional provision specifically states that such bonds shall not be or constitute a debt of the state. La. Const. of 1921, art. VI, § 22(g).

Subsequently, the legislature enacted laws imposing financial and budgetary regulations upon the GNOEC. Act 762 of 1986, § 12, requires the GNOEC to comply with the Louisiana Local Government Budget Act which governs the budgetary procedures of local government entities. Act 875 of 1988 requires the GNOEC to comply with the Louisiana Administrative Procedures Act with respect to contracts and bonds and to submit its proposed annual budget to the joint legislative budget committee for review and approval. 1988 La. Acts 875 § 2(B) & (C). This legislation, however, did not alter the essential powers or characteristics of the GNOEC in any respect. In fact, Act 762 of 1986 expressly recognized and reaffirmed that the GNOEC is the same commission that was "created by the parishes as an agency and instrumentality of the parishes, pursuant to articles of incorporation dated October 20, 1954." 1986 La. Acts 762 § 1(2) (emphasis added).

In addition, Louisiana courts have characterized the GNOEC as a local or interparish entity rather than as an arm of the state. See Greater New Orleans Expressway Comm'n v. Board of Tax Appeals, 681 So.2d 957, 959-60 (La.App.5th Cir.1996) (holding that the GNOEC was not a state agency or commission which would be exempt from

state sales and use taxes); Parish of Jefferson v. Roemer, 539 So.2d 97, 100 (La.App. 5th Cir.1989) (describing the GNOEC as an "interparish entity" created under the provisions of La.R.S. 33:1324); see also Schultz v. Greater New Orleans Expressway Comm'n, 250 F.Supp. 89, 91-92 (E.D.La.1966) (holding that the GNOEC was a distinct political corporation created by the parishes of Jefferson and St. Tammany and, therefore, not entitled to Eleventh Amendment immunity).

In sum, Louisiana laws and court decisions characterize the GNOEC as a local, interparish entity and not as an arm of the state.

(2) The source of funds for the GNOEC.

An important goal of the Eleventh Amendment is the protection of state treasuries. Delahoussaye, 937 F.2d at 148-49. Therefore, whether "the action is in essence one for the recovery of money from the state," is a most significant test in determining whether "the state is the real party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." Ford Motor Co., 323 U.S. at 464, 65 S.Ct. at 350; see Edelman, 415 U.S. at 663, 94 S.Ct. at 1356 ("Thus the rule has evolved that a suit by private parties seeking to impose liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."); United Carolina Bank v. Board of Regents, 665 F.2d 553, 560 (5th Cir.1982).

The GNOEC finances its operation and maintenance of the Lake Pontchartrain Causeway with self-generated income, viz., toll revenue and bond investment income.

Bonds issued by the GNOEC, which generate construction and investment revenues, do not constitute debts of the state and are not backed by the full faith and credit of the state. La. Const. of 1921, art. VI, § 22(g); Cf. Jacintoport Corp. v. Greater Baton Rouge Port Comm'n, 762 F.2d 435, 439 (5th Cir.1985) (noting that a state's guarantee of bonds issued by an entity can be evidence, however slight, of state agency status). The GNOEC finances its bond debt service with its bond investment revenue and with money allocated from State Highway Fund No. 2.

The only money the GNOEC receives from the state comes from State Highway Fund No. 2, which was created in 1952 as part of the enabling legislation which led to the creation of the GNOEC. See La. Const. of 1921, art. VI, § 22(g). The fund consists of vehicular license taxes collected from a six parish area surrounding Lake Pontchartrain.[1] See Roemer, 539 So.2d at 99 (discussing the creation of Fund No. 2). A portion of this fund is allocated to the GNOEC every year in order to finance debt service on the bonds previously issued. However, Fund No. 2 monies may not be used to finance the operation and maintenance of the causeway. In sum, the GNOEC receives no operating revenue from the state; the funds transferred to it by the state are derived from the six parish region served by the causeway and are dedicated solely to debt service on GNOEC bonds.

The GNOEC treats liabilities resulting from monetary damage judgments as an operating expense and pays or

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[1] The six parishes are as follows: Orleans, Jefferson, St. John the Baptist, St. Charles, Tangipahoa, and St. Tammany.

insures against them on its own. In order to defray such expenses, the GNOEC procures liability insurance policy coverages and maintains a "Self Insurance Retention Fund" for excess coverage. According to the testimony of GNOEC's CPA, it has never had to pay a judgment which was not adequately covered by its insurance or the Self Insurance Retention Fund. Moreover, the general manager of the GNOEC testified that the state of Louisiana has never paid a judgment or claim on behalf of the GNOEC. Therefore, on the record before us, it appears that any judgment obtained by Pendergrass can be satisfied by the GNOEC itself rather than by the state treasury.

Nevertheless, the defendants contend that the GNOEC should be considered an arm of the state because judgments against it may indirectly affect the size of the GNOEC's surplus which it is required by the 1988 Act to turn over to the state at the end of each fiscal year. See 1988 La. Acts 875 § 4. This [sic] not a sufficient reason to consider the GNOEC an alter ego of the state. Historically, judgments against the GNOEC have been paid without any state assistance from its own insurance policies or self insurance fund that it maintains by regular payments as current operating expenses. The 1988 Act provides that the GNOEC shall pay all of its maintenance and operating expenses before any of its funds become surplus that it is obliged to turn over to the state. Under these circumstances, a judgment in favor of Pendergrass against the GNOEC will not be paid with public funds from the state treasury. Any influence upon the state treasury by such a judgment would be too indirect and remote to characterize it as a potential liability of the

state treasury or to make the state the real, substantial party in interest.

In summary, the GNOEC is a self-supporting entity which finances its own operational costs through tolls and investments. It receives money from the state for the limited purpose of servicing bonded debt. The GNOEC's bonds are not backed by the full faith and credit of the state and, thus, do not constitute a debt owed by the state. Any judgment rendered in this case would not be paid out of the state treasury but by the GNOEC through either its insurers or its self insurance fund. Accordingly, this factor weighs heavily against classifying the GNOEC as an arm of the state or permitting it to invoke Eleventh Amendment immunity. Cf. Jacintoport Corp., 762 F.2d at 440-42.

(3) The degree of local autonomy the entity enjoys.

The third factor we look to focuses on the degree of local autonomy the entity at issue enjoys. "Local autonomy is not only a measure of the closeness of the connections between the entity and the State, it is also the mechanism through which the Eleventh Amendment 'assure[s] that the federal courts do not interfere with a state's public policy and its administration of internal public affairs.' " Jacintoport Corp., 762 F.2d at 442 (quoting Blake v. Kline, 612 F.2d 718, 725 (3rd Cir.1979), cert. denied, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1112 (1980)).

The Greater New Orleans Expressway Commission itself is composed of five members who are charged with the construction, operation, and maintenance of the Greater New Orleans Expressway, which is commonly

called the "causeway." Three of the GNOEC's commissioners are appointed by the governor, subject to conditions, as follows: (1) a member from Jefferson Parish, recommended by the Jefferson Parish Legislative Delegation, for a two year term, (2) a member from St. Tammany Parish, upon the recommendation of the St. Tammany Parish Legislative Delegation, for a two year term, and (3) a member for a one year term alternately from Jefferson Parish and St. Tammany Parish, recommended by the applicable legislative delegation. 1988 La. Acts. 875 § 11. All of the governor's appointments are subject to confirmation by the state senate. Id. Two members are appointed by the parish governing bodies as follows: one is appointed for a two year term by the Jefferson Parish Council and the other for a two year term by the St. Tammany Parish Police Jury. Id.

The defendants assert that because the governor appoints a majority of the GNOEC, it enjoys very little local autonomy. The governor's appointment power is not plenary, however. The governor is authorized to make appointments only upon the recommendation of the local legislative delegations and subject to senate approval. Furthermore, the three members appointed by the governor serve for a specified term and not at his or her pleasure. Contrast Jacintoport, 762 F.2d at 442 ("It is true that the vulnerability of the commissioners to the governor's pleasure militates against a finding of local autonomy."). Finally, the other two members of the GNOEC are appointed by the local governing bodies and are thus indirectly responsible to the local electorate. See McDonald v. Board of Mississippi Levee Comm'rs, 832

F.2d 901, 907 (5th Cir.1987) (finding that the fact that the Levee Board was locally elected evidenced autonomy).

In this case, the governor's role in the appointment process does not prevent the GNOEC from having a high degree of local autonomy because the parish appointments, fixed terms of appointments, local legislative delegation nomination, and senate approval tug strongly in that direction.

(4) Whether the entity is concerned with primarily local, as opposed to state-wide problems.

The district court found the business of the GNOEC to be primarily a local concern. The defendants counter that because the heavily traveled expressway is considered part of the state highway system, the work of the GNOEC is of state-wide concern. See 1986 La.Acts. 762 § 9(1) (designating the expressway as part of the state highway system).

The relevant test, enunciated by this court in the Jacintoport Corp. case, is whether the entity acts for the benefit and welfare of the state as a whole or for the special advantage of local inhabitants. Jacintoport, 762 F.2d at 443. Originally, the causeway project was undertaken by the parishes of Jefferson and St. Tammany to encourage the development of each parish. To that end, the GNOEC has been a success and clearly works for the benefit and welfare of the inhabitants of St. Tammany and Jefferson, along with those residents of near-by parishes who occasionally make use of the bridge. While the causeway is certainly an important part of the state highway system, it predominantly benefits the commuters who live in St. Tammany and work or shop in Jefferson or

Orleans Parishes, as well as their south shore employers and suppliers of goods and services. The concern of the GNOEC is solely the causeway, a bridge connecting and serving principally three parishes, and is thus primarily local. Cf. Id. (holding that Greater Baton Rouge Port Commission dealt with matters of local concern).

(5) & (6) Whether the entity has authority to sue and be sued in its own name; and Whether the entity has the right to hold and use property?

The GNOEC's power to sue and be sued tends to favor a finding that it is not an arm of the state.

In addition, the GNOEC has the right to hold and use property. This factor points toward a finding that the GNOEC is not an arm of the state. The fact that at some time in the distant future, after the GNOEC's bonds are paid and the tolls dispensed with, the GNOEC's property may revert to the state, does not change the present state of affairs under which the GNOEC owns, operates, and maintains the causeway system with a high degree of autonomy.

In the alternative, the defendants assert that Officers Hurstell and Digby are not "persons" within the meaning of 42 U.S.C. § 1983 because they should be considered "state" police officers at the time of the plaintiff's arrest, regardless of the status of the GNOEC. The district court rejected this argument and we agree. In this case, the district court correctly construed the plaintiff's complaint as evidencing an intent to sue the two officers in their individual capacities. Thus, even if the GNOEC were a state agency, which it is not, then this suit could still

proceed against these putative state officials in their individual capacities because, in such a capacity, they are "persons" within the meaning of § 1983. Hafer v. Melo, 502 U.S. 21, 31, 112 S.Ct. 358, 365, 116 L.Ed.2d 301 (1991).

## Conclusion

Upon considering all relevant factors, we conclude that the GNOEC is not an arm of the state of Louisiana and therefore may not invoke Eleventh Amendment immunity. For essentially the same reasons ably assigned by the district court, its decisions to deny GNOEC's motion for summary judgment and/or dismissal for lack of subject matter jurisdiction is AFFIRMED and the case is REMANDED for further proceedings.

**Robert G. PENDERGRASS**

**v.**

**GREATER NEW ORLEANS EXPRESSWAY COMMISSION, et al.**

**Civ.A. No. 95-1154.**

United States District Court, E.D. Louisiana.

April 16, 1997.

ORDER

PORTEOUS, District Judge.

Pending before this court are defendant Greater New Orleans Expressway Commission's ("GNOEC") Motion for Summary Judgment and Motion to Dismiss for Lack of Subject Matter Jurisdiction (R. Doc. 34). For the reasons discussed below, it is the decision of this court that defendant's Motion for Summary Judgment and Motion to Dismiss for Lack of Subject Matter Jurisdiction are DENIED.

## I. FACTUAL BACKGROUND

Plaintiff, Robert Pendergrass, filed the above captioned matter claiming that on July 29, 1994, he was traveling south on the Causeway Bridge ("Causeway") off of the end of the bridge continuing south on Causeway Boulevard in Metairie, Louisiana. After exiting the bridge, Pendergrass was stopped and questioned by Causeway Commission Officers David Hurstell and James Digby for an [sic] allegedly speeding on the Causeway. During the questioning plaintiff was placed under arrest and handcuffed. Plaintiff then claims to have

received blows to the head and then been pushed to the ground. Pendergrass further claims to then have been pulled back up by his handcuffs and pulled around. Pendergrass files the instant suit under Title 42 U.S.C. § 1983 claiming physical and emotional damages, reimbursement of medical expenses, costs, attorney's fees and punitive damages.

Defendant GNOEC then filed this Motion presently before the Court asserting the GNOEC is an arm of the state and entitled to Eleventh Amendment immunity. Having received the motion, the memoranda, the record and the applicable law the Court is now fully advised of the premises and ready to rule.

## II. ANALYSIS

Our task on the grant of a motion for summary judgment is to determine whether a genuine issue exists concerning any material fact, and if not, whether the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; City of Madison, Miss. v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057, 1059 (5th Cir.1987). The parties do not dispute the essential facts in this case, and the only question before this court is whether the GNOEC is entitled to judgment as a matter of law.

Eleventh Amendment – Suit against the state "The Eleventh Amendment to the United States Constitution bars suits in federal court by citizens of a state against their own state or a state agency or department." Voisin's Oyster House, Inc. v. Guidry, 799 F.2d 183, 185-86 (5th Cir.1986). The Eleventh Amendment states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the amendment does not explicitly bar suits against a state by its own citizens, the Supreme Court consistently has held "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." Edelman v. Jordan, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355-56, 39 L.Ed.2d 662 (1974). Although Pendergrass's amended complaint did not name the state as a party, suit nevertheless may be barred if the state is the real party in interest. Edelman v. Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662 (1974) ("[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.) (quoting Ford Motor Co. v. Department of Treasury of State of Louisiana, 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945)).

Pendergrass seeks actual and compensatory damages for mental anguish, psychological and emotional distress, physical pain and suffering, disability, loss of income, loss of earning capacity, medical expenses (past and future), punitive damages and attorney's fees. The GNOEC argues that under the six factor test annunciated in Delahoussaye v. New Iberia, 937 F.2d 144 (5th Cir.1991) the Causeway is an arm of the state and should receive the protection of Eleventh Amendment immunity from

suit. Such an award is prohibited by the Eleventh Amendment, the GNOEC reasons, unless the state through the GNOEC waived its Eleventh Amendment immunity. The state has not given an express waiver of its immunity from suit under the Eleventh Amendment. See La.Rev.Stat.Ann. § 13:5106. Pendergrass, however, argues that the Causeway is independent of the state and contends that the district court had no evidence before it that an award against the Causeway would be paid from the state treasury.

The GNOEC asserts that the state is the real party in interest because the Causeway is an arm of the state. The Fifth Circuit has stated that "[a] federal court must examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state itself." Laje v. R.E. Thomason General Hospital, 665 F.2d 724, 727 (5th Cir.1982). The following factors must be examined to determine whether an entity is an arm of the state: (1) whether the state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name; (6) whether the entity has the right to hold and use property. Delahoussaye v. New Iberia, 937 F.2d 144, 147 (5th Cir.1991). It is the opinion of this court that these factors establish that the Causeway is not an arm of the state.

(1) Whether state law characterizes the agency as an arm of the state

GNOEC argues that state law does not directly characterize the GNOEC as either a state agency or local government entity. The GNOEC's creation was authorized by the Louisiana Constitution of 1921, Article VI § 22 and an enabling statute which allowed St. Tammany and Jefferson parishes to incorporate and form the GNOEC. The state laws which regulate GNOEC are statutes which apply to state agencies, not local government entities. Louisiana State Finance Laws, La. R.S. 39:79 and La. R.S. 39:82, and Louisiana Administrative Procedure Act, La. R.S. 49:951 et seq. However, as GNOEC's motion acknowledges, state law only indirectly characterizes GNOEC as an arm of the state by treating it as a state agency.

Pendergrass aggressively counters GNOEC's argument by pointing out that GNOEC's existence was not created by the Constitution, but instead by a contract between the parishes of Jefferson and St. Tammany through GNOEC's Articles of Incorporation. These articles plainly characterize the GNOEC as " . . . a body corporate and political as an agency and instrumentality of the Parishes of Jefferson and St. Tammany . . . " having the power " . . . to sue and be sued." Pendergrass argues that the subsection of the Louisiana Constitution of 1921, Article VI, Section 22 which refers to the Causeway recognizes and confirms the right of the parishes to contract for the purposes of constructing and maintaining the Causeway but does not create it.

The Louisiana Fifth Circuit Court of Appeals recently found in Greater New Orleans Expressway Commission v. Board of Tax Appeals, State of Louisiana, 681 So.2d 957 (La.App. 5th Cir.1996) the GNOEC was not a state agency or commission for the purposes of receiving tax exempt status. This is clearly a statement of whether or not state law characterizes the GNOEC as an arm of the state.

(2) The source of funds for the entity

The question whether a money judgment against a state instrumentality or official would be enforceable against the state is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued. Regents of the University of California, et al v. Doe, ___ U.S. ___, 117 S.Ct. 900, 903, 137 L.Ed.2d 55 (1997). GNOEC argues that although GNOEC generates its own revenues from tolls and bond issues it depends upon state funds and is an important source of funding for the Louisiana state treasury. Any surplus at the end of the GNOEC's fiscal year does not belong to GNOEC, but rather, is classified as "state funds" because state law mandates the usage of these surplus funds. GNOEC argues that since payment of a judgment against it would be with funds which would otherwise be earmarked for the state treasury as surplus this money is therefore state funds.

Pendergrass argues that the articles of incorporation of the GNOEC empower it to construct, operate and maintain in its corporate name a toll bridge or Causeway across Lake Ponchatrain, [sic] and to sell revenue bonds or refinance revenue bonds for the purpose of financing

construction. This power is stated in conformity with Louisiana revised statute 33:1321, et seq. The Louisiana Constitution of 1921 also limits the state's liability:

> " . . . Said revenue bonds shall be payable solely from the tolls and other revenues derived from the Expressway and the other funds dedicated therefore pursuant hereto and the faith and credit of said State of Louisiana or said Parishes or any other political subdivision of this State shall not be pledged in any manner for the Payment of said revenue bonds, or the interest thereon . . . said revenue bonds shall not be or constitute a debt of the State of Louisiana or of said Parishes or either of them or any other political subdivision of this State . . . "

GNOEC's source of funds is tolls, revenue bonds, for which the state is not responsible, and state Highway No. 2 money which represents the state's contribution to the construction phase of this project. The state Highway No. 2 funds are derived from the collection of vehicular license taxes in the Parishes of Orleans, Jefferson, St. John the Baptist, St. Charles, Tangipahoa and St. Tammany. This money is placed into a special reserve fund in the state treasury and dedicated to these Parishes jointly for the specific purpose of supplementing those amounts received as net tolls and revenues from the operation of the expressway to pay the principal and interest on the revenue bonds issued by the GNOEC to finance the construction and improvements of the expressway. The state's liability, if any, is limited to a reserve fund whose source of income is derived from these Parishes. The only funds deposited into the state treasury represent the surplus from the GNOEC, over and above that generated by

the GNOEC. Claims and judgments are considered costs of maintaining the Causeway.

(3) The degree of autonomy the entity enjoys

GNOEC argues that it has little or no autonomy in that its commissioners are selected primarily by the governor, subject to Senate confirmation, with a minority selection by the Parishes. Pendergrass points out that though three of the five commissioners are appointed by the governor all three are first recommended by the Jefferson and St. Tammany Parish legislative delegation. The remaining two are appointed by the Jefferson Parish Council and St. Tammany police jury. At best, this element is neutral.

(4) Whether the entity is concerned primarily with local, as opposed to statewide, problems

GNOEC reasons that the Causeway's building and maintaining a bridge that is part of the Louisiana state highway system and providing services to approximately 33,000 vehicles daily evidences its performance as a state function. GNOEC does, however, recognize one important point – THE STATE WILL NOT CLAIM OWNERSHIP OF THE CAUSEWAY UNTIL THE FINANCING BONDS HAVE BEEN REPAID. GNOEC further argues that GNOEC police have been vested with the arrest powers of the state thus giving them and the GNOEC a state function.

Pendergrass counters this argument noting that the express reason for the creation of the GNOEC was not to

perform a state function but instead to construct and maintain the Expressway. The intended purpose of the causeway is to provide a shorter route between Jefferson and St. Tammany parishes – a local problem. The origin of the Causeway was created by both parishes primarily to benefit the commuters of both parishes. Pendergrass also notes that the state police can also commission any legal entity which seeks such authority, whether state parish or private.

(5) Whether the entity has the right to sue and be sued in its own name

The original articles of incorporation of the GNOEC give it the right and power to sue and be sued in its own name. GNOEC argues that the legislature tempered that right by requiring all proposed bonds and contracts issued after August 1, 1988 to be subject to the oversight provision of the Louisiana Administrative Procedures Act.

Pendergrass argues that though this legislative amendment was made in 1988 the original articles of incorporation of the GNOEC have not been amended to delete or delineate the GNOEC's right to sue or be sued; therefore this provision is still in effect. The court finds this persuasive for summary judgment purposes.

(6) Whether the entity has the right to hold and use property

The state declared the Causeway to be part of the state highway system from its creation. GNOEC argues

that in 1986 legislation was passed continuing GNOEC's right to "construct, operate, and maintain the expressway over, under, through, and across and state owned lands, surfaced or submerged, necessary therefore . . . " 1986 La. Acts No. 762, Section 9(3), (emphasis added).

Pendergrass urges that though this act was passed into legislation the GNOEC still possesses the right and power " . . . to acquire, purchase, lease as lessee, hold and use any franchise, property, real, personal or mixed, tangible or intangible, or any interest therein . . . " as consistent with Louisiana R.S. 33:1321, et seq. – the statutes allowing for the creation of such an entity. The one factor that is still apparent is the ownership of the Causeway that is presently with the Causeway commission and will not revert to the state until the outstanding bonds are paid. The GNOEC's right to hold and use land as set out in the 1986 act greatly supports Pendergrass contention that GNOEC is an entity separate and apart from the State.

Having reviewed these factors and their applicability to the GNOEC, it is the decision of this court that the GNOEC is not a state agency or arm of the state. Therefore, the GNOEC's is not entitled to Eleventh Amendment immunity from suit and the motion of GNOEC requesting that it be entitled to Eleventh Amendment immunity is DENIED.

GNOEC alternatively requests that this court find that GNOEC and its officers are not "persons" within the meaning of 42 U.S.C. § 1983, and cannot be held liable under the act. The United States Supreme Court has held that the state and state agencies are not "persons" within

the meaning of the Civil Rights Act, 42 U.S.C. § 1983, and therefore cannot be held liable under the act. Will v. Michigan Dep't of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). GNOEC argues that even if the GNOEC and its officers are not granted Eleventh Amendment immunity, GNOEC officers were not acting as "persons" under 42 U.S.C. § 1983.

Pendergrass claims that though Officers Hurstell and Digby may not be subject to liability for their actions as state officials in their official capacities they may still be held liable pursuant to § 1983 in their individual capacity for actions taken under color of state law. Pendergrass's complaint clearly indicates an intention by plaintiff to sue officers Hurstell and Digby in their individual capacities. As the Supreme Court stated in Hafer v. Melo, 502 U.S. 21, 112 S.Ct. 358, 362, 116 L.Ed.2d 301 (1991), " . . . the phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the State officer is sued, not the capacity in which the officer inflicts the alleged injury." Therefore, it is the finding of this court that GNOEC's request that in the situation of arrests, GNOEC and its officers be found not to be a "person" under 42 U.S.C. § 1983 is DENIED.

Accordingly,

IT IS ORDERED that the Motion of the Greater New Orleans Expressway Commission for Summary Judgment and/or to Dismiss for Lack of Subject Matter Jurisdiction, be, and the same is hereby DENIED IN PART finding that GNOEC is not entitled to Eleventh Amendment immunity from suit.

IT IS FURTHER ORDERED that the Motion of the Greater New Orleans Expressway Commission for Summary Judgment and/or to Dismiss for Lack of Subject Matter Jurisdiction, be, and the same is hereby DENIED finding that GNOEC's request that in the situation of arrests, GNOEC and its officers be found not to be a "person" under 42 U.S.C. § 1983 is DENIED.

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**Louisiana Constitution of 1921, Article VI, § 22(5)**

* * *

(5) Out of the existing monies in State Highway Fund No. 2, the State Treasurer shall set aside and advance to the Parishes of Jefferson and St. Tammany as needed, amounts up to an aggregate of Three Hundred Fifty Thousand Dollars ($350,000.00) to be used by said Parishes for the purpose of defraying costs of detailed engineering plans and specifications and the obtaining, gathering and compiling of all data necessary thereto and the costs thereof required for the construction of the toll bridge or causeway and requisite approaches across Lake Pontchartrain and connecting the Parishes of Jefferson and St. Tammany, which said Parishes have contracted in accordance with existing laws to jointly finance, construct, operate and maintain. Said toll bridge or causeway and requisite approaches shall be designated as the "Greater New Orleans Expressway" (hereinafter referred to as "Expressway"), and shall be constructed by said Parishes across Lake Pontchartrain extending from a point in the Parish of Jefferson to a point in the Parish of St. Tammany. The exact location, subject to the above limitations, shall be subject to approval by the State Department of Highways or its successor. The Expressway shall be operated by said Parishes as a toll project with reasonable tolls being charged for its use but always sufficient in amount to provide adequate revenues to pay all costs of operation and maintenance of the Expressway and, together with the funds dedicated in this Subsection (g), the principal of and interest on revenue bonds which

said Parishes of Jefferson and St. Tammany may lawfully issue jointly for the construction of the Expressway, all payments required by the provisions of the resolution authorizing the issuance of said revenue bonds for reserve funds, sinking funds, or other funds and to comply fully with all terms and conditions of any covenants or agreements with the holders of said revenue bonds.

On June 30, 1953 all of the monies remaining in State Highway Fund No. 2 after all payments hereinabove required up to and including that date shall have been made, shall be paid into a special Reserve Fund in the State Treasury. Commencing on June 30, 1954 and on June 30th of each year thereafter all of the surplus monies remaining in State highway fund No. 2 after all annual payments hereinabove required shall have been made, shall also be paid into said special Reserve Fund in the State Treasury. The first Five Million Dollars ($5,000,000.00) accumulating in said Reserve Fund shall be set aside and used by the State Department of Highways or its successor for the purpose of constructing approach roads, including any and all structures necessary therefor, which approach reads may be constructed separate from or as part of existing highways and shall connect same with the Expressway. Said approach roads shall be ready for use upon completion of the Expressway, shall be constructed and maintained by the State Department of Highways or its successor as part of the State Highway System, shall be of such design as said Department or its successor shall determine, and the location thereof shall be designated by the governing authorities of the Parishes of Jefferson and St. Tammany with the approval of said State Department of Highways

or its successor, with the objective always being the generation of the maximum amount of traffic for the Expressway commencing at its completion. All monies remaining in said Reserve Fund after the allocation of said Five Million Dollars ($5,000,000.00) shall be available exclusively for use by the Parishes of Jefferson and St. Tammany to supplement the amounts received as net tolls and revenues from the Expressway, to promptly pay the principal of and interest on said revenue bonds issued by them. After said revenue bonds have been fully paid in principal and interest, any surplus of monies remaining in said Reserve Fund and thereafter accumulating in it shall be transferred to the General Highway Fund.

So long as any of said revenue bonds issued by the Parishes of Jefferson and St. Tammany are outstanding neither the State of Louisiana nor any municipality, parish, political subdivision or agency thereof nor any body under its control shall construct or permit the construction or operation of any vehicular bridge, causeway, tunnel or ferry across Lake Fontchartrain at any point within ten miles of the Expressway.

The power and authority of the Parishes of Jefferson and St. Tammany to jointly construct the Expressway and to issue revenue bonds jointly for such purpose is hereby expressly confirmed. So long as any of said revenue bonds are outstanding, the provision of this Sub-section (g) of Section 22 of Article VI of this Constitution shall be irrevocable and shall be and constitute a valid and binding contract between the holders of any of such revenue bonds, the Parishes of Jefferson and St. Tammany, and the State of Louisiana, and shall be fully enforceable in any court of competent jurisdiction by any of the holders of

said bonds. But said revenue bonds shall be payable solely from the tolls and other revenues derived from the Expressway and the other funds dedicated therefor pursuant hereto, and the faith and credit of said State of Louisiana or said Parishes or any other political subdivision of the State shall not be pledged in any manner for the payment of said revenue bonds, or the interest thereon, and no tax funds, other than the funds dedicated therefor herein shall ever be used for the payment of said revenue bonds or the interest thereon. Said revenue bonds shall not be or constitute a debt of the State of Louisiana or of said parishes or either of them or any other political subdivision of the State for any purpose and each of said revenue bonds shall contain an express statement that the principal of and interest on said revenue bonds are payable solely from the tolls and other revenues derived from the Expressway, and the funds dedicated therefor herein, and that no holder or holders of said revenue bonds shall ever be entitled to require or compel the levy of any ad volorem or other taxes, other than the funds dedicated therefor herein for the payment thereof, or to compel the payment thereof from any other source other than said tolls and other revenues derived from said Expressway, and the funds dedicated therefor herein.

The Parishes of Jefferson and St. Tammany are hereby granted the right and privilege to jointly construct, operate and maintain the Expressway over, under, through and across any State owned lands, surfaced or submerged, necessary therefor; provided, that when the said revenue bonds of said Parishes shall have been fully paid in principal and interest, the Expressway shall

become the property of the State of Louisiana, and shall thereafter be operated and maintained by the State Department of Highways as a toll-free project and as part of the State Highway System.

The Expressway is hereby declared to be a part of the State Highway System, and the State Department of Highways or its successor is authorized to enter into contracts with the Parishes of Jefferson and St. Tammany for the operation and maintenance of the Expressway.

Funds herein dedicated in this Sub-section (g) for use in the payment of bonds may only be used for that purpose in the event that the particular bonds for the payment of which funds are to be used were sold in the following manner. Said bonds shall be sold by the issuing authority to the highest bidder at public sale, for not less than par and accrued interest, after advertisement at least once a week for not less than thirty days in New Orleans, Chicago, New York and such other public places as said issuing authority may determine, reserving to said issuing authority the right to reject any and all bids. In the event the issuing authority rejects all bids, it shall have the right to readvertise for new bids or to negotiate publicly with the bidding groups and to sell the bonds on terms more advantageous than the best bid submitted. In the event that no bids are submitted, the issuing authority shall have the right to sell the bonds on the best terms it can publicly negotiate, or to readvertise for new bids as provided herein.

If for any reason the funds herein dedicated and provided to be paid shall not be used by or paid over to any one or more of the agencies to which said funds are

dedicated, the remainder of such dedication shall nevertheless be carried out as herein provided.

Any and all expenditures of monies in connection with the financing and construction of any of the projects provided for in this Sub-section (g) whether made by said State Department of Highways, by said bridge and ferry authority or by any of the aforesaid parishes, shall be subject to examination and audit by the Supervisor of Public Funds in the manner provided by Chapter 7 of Title 49 of the Louisiana Revised Statutes of 1950.

This amendment shall be self-operative, and no further or other legislation shall be required to effect the same.

The purpose of this amendment is to secure the development of the State of Louisiana by the construction of the Mississippi River crossing and the Expressways described herein and it shall be liberally construed to effectuate such purpose.

* * *

1986 La. Acts 762

ACT 762

Regular Session, 1986 ENROLLED

SENATE BILL NO. 523

BY MESSRS. HOLLIS, CASEY, HINTON, LAURICELLA, NICHOLSON AND WINDHORST AND REPRESENTATIVES ALORIO, ALEXANDER, ANDREPONT, BENOIT, ALQUNI, BORNE, CAIN, CARTER, CROSBY, CUSIMANO, DAMICO, DATUGUE, DEANO, DEWITT, D'GEROLAMO, DIESI, DIEZ, DIMOS, DOUCET, FORSTER, GEE, GUIDRY, HAIK, HAND, HEITMEIER, IVON, C. D. JONES, KENWARD, LANCASTER, LEACH, LEMOINE, J. D. LONG, LOWENTHAL, MCKEITHEN, NEWMAN, RIPOLL, RUSSELL, SALTER, SCOGIN, SCOTT, SHERIDAN, SIRACUSA, SITTIG, STRAIN, THERIOT, THIBODEAUX, F. THOMPSON, TOOMY, AND TRAVIS

AN ACT

To authorize the Greater New Orleans Expressway Commission to issue bonds for the purpose of refunding, refinancing, restructuring, extending, or unifying the whole or any part of its outstanding bonded indebtedness and to finance the cost of construction of improvements and betterments to the Greater New Orleans Expressway, prescribing the terms and conditions under which such bonds may be issued and the security for such bonds, confirming, approving, and continuing in effect certain

rights, powers, and privileges of the commission; to provide for surplus funds; and to provide for related matters.

Notice of intention to introduce this Act has been published as provided by Article III, Section 13 of the Constitution of Louisiana.

Be it enacted by the Legislature of Louisiana:

Section 1. Definitions

As used in this Act, the following terms shall have the following meanings:

(1) "Bonds" means the bonds issued to finance the cost of construction of improvements and betterments to the expressway and refunding bonds, authorized to be issued pursuant to the terms of this Act.

(2) "Commission" means the Greater New Orleans Expressway Commission, created by the parishes as an agency and instrumentality of the parishes, pursuant to articles of incorporation dated October 30, 1954.

(3) "Expressway" means the Greater New Orleans Expressway, a bridge-causeway, and requisite approaches, across Lake Pontchartrain connecting the parishes.

(4) "Outstanding bonded indebtedness" or "outstanding bonds" means the outstanding Greater New Orleans Expressway Refunding and Improvement Bonds, Series A and Series B, dated January 1, 1967, and Series A-1973, dated May 1, 1973, of the commission and the parishes.

(5) "Parishes" means the parish of Jefferson and the parish of St. Tammany, Louisiana.

(6) "Refunding bonds" means the bonds authorized to be issued to refund, refinance, restructure, extend, or unify the whole or any part of the outstanding bonded indebtedness.

(7) "State Highway Fund No. 2 monies" means that portion of the funds derived from the collection of vehicular license taxes in the parishes of Orleans, Jefferson, St. John the Baptist, St. Charles, Tangipanoa, and St. Tammany, which are payable under Article VI, Section 22(g)(S) of the Louisiana Constitution of 1921 into a special Reserve Fund in the state treasury and dedicated to the parishes jointly and to the commission to supplement the amounts received as net tolls and revenues from the expressway to pay the principal of and interest on the revenue bonds issued by the parishes jointly and the commission to finance the construction and improvement of the expressway.

Section 2. Authorization of bonds

Notwithstanding any other laws of the state of Louisiana, the commission is hereby authorized and empowered, with the approval of the State Bond Commission and the governing bodies of each of the parishes, to issue bonds as herein provided on behalf of the parishes for purposes of refunding, refinancing, restructuring, extending, or unifying the whole or any part of its outstanding bonded indebtedness and to finance the cost of the construction of improvements and betterments to the expressway, including construction of approaches and

access roads, bridges, overpasses, and any other structures and traffic safety facilities related to the expressway, and the costs of the issuance of the bonds. The bonds issued for the purpose of refunding, refinancing, restructuring, extending, or unifying the whole or any part of its outstanding bonded indebtedness shall be issued in an amount sufficient to provide the funds necessary to effectuate such purpose and to pay all costs associated therewith. The bonds issued for the purpose of constructing said improvements and betterments to the expressway may be issued in an amount not exceeding forty-nine million dollars ($49,000,000), exclusive of refunding bonds. Bonds issued for the purpose of constructing improvements and betterments may be issued for the following specified projects indicated with the estimated costs for each being set forth opposite the particular project:

Design and construct safety and capacity improvements, including a grade separation structure north of the North Toll Plaza in St. Tammany Parish

$10,000,000

In Jefferson Parish, widen existing Causeway Boulevard at grade to six (6) lanes from Veterans Memorial Boulevard to the Commission's South Toll Plaza, including right and left turning lanes, u-turns and crossovers to improve safety and capacity

$6,000,000

In Jefferson Parish, design and construct grade separation structures to provide safety and capacity improvements between Veterans

Memorial Boulevard and the Commission's South Toll Plaza

$25,000,000

In Jefferson Parish, at I-10/Causeway Boulevard, redesign and upgrade existing interchange to improve safety and capacity by addition of elevated ramp structures connecting to Veterans Memorial Boulevard Overpass

$2,500,000

In Jefferson Parish, design and construct improvements to Causeway Boulevard to increase safety and capacity from Jefferson Highway to I-10

$2,500,000

If additional funds are available they will be dedicated to the construction of breakdown bays and/or crossovers on the bridge

Nothing herein contained shall prevent the commission from using any available monies obtained from sources other than bond proceeds to fund in whole or in part any of the specified projects, and amounts in excess of the estimated costs may be obtained from bond proceeds to complete a specified project. Bonds may be issued for other improvement projects approved by the commission and the governing bodies of each of the parishes.

Section 3. Manner of issuing bonds

The bonds shall be issued pursuant to a resolution adopted by the commission, which resolution shall fix all

details of the bonds, including their form, terms, repayment schedule, and redemption features. The bonds may be issued in one or more series from time to time. The refunding bonds may be issued together with bonds being issued to finance improvements and betterments to the expressway as a single series.

The commission shall have authority to adopt all proceedings necessary for the authorization, sale, and delivery of the bonds, including the right to enter into all contractual arrangements as may be necessary to effectuate the purposes for which the bonds are being issued, upon terms determined by the commission to be advantageous and beneficial to it.

Section 4. Security for bonds

The bonds may be secured in the same manner as the outstanding bonds, said outstanding bonds being payable from the tolls and other revenues derived from the operation of the expressway as supplemented by State Highway Fund No. 2 monies allocated exclusively to the parishes for the payment of bonds issued in connection with the construction and improvement of the expressway or the refunding of such bonds. The dedication of State Highway Fund No. 2 monies to the payment of bonds of the commission and the parishes, which is authorized by and remains in effect under the Louisiana Constitution of 1974, is hereby reaffirmed and shall remain in effect until all bonds of the commission authorized heretofore and hereby have been paid in full or defeased, and there is hereby authorized to be pledged to the payment of such bonds the income and revenues

derived from the operation of the expressway and the aforesaid State Highway Fund No. 2 monies.

The bonds also may be secured by a trust agreement by and between the commission and one or more corporate trustees, and may be further secured by credit enhancement devices, including, but not limited to, letters of credit, bank guarantees, municipal bond insurance, and any other cost effective device designed to improve the credit quality and marketability of securities. After the discharge and release of the Trust Agreement for Greater New Orleans Expressway dated as of January 1, 1967 securing the outstanding bonded indebtedness of the commission, any revenues of the commission remaining at the end of each fiscal year after (i) payment of all expenses of maintaining and operating the facilities of the commission and providing for necessary renewals and replacements thereof, and (ii) satisfaction of all obligations of the commission under the terms of any resolution, ordinance, or indenture authorizing the issuance of any bonds authorized in Section 2 of this Act, shall be considered surplus. This surplus shall be transferred at the end of each fiscal year to the treasurer of the state of Louisiana for deposit in the state treasury. The first year surplus of three million dollars shall be transferred to the state treasury no later than January 1, 1987; provided, however, that prior to the transfer of such surplus to the state treasury, the commission shall use so much of said surplus as may be necessary for its officers to police the Huey P. Long Bridge and shall transfer fifty thousand dollars each fiscal year to each of the parishes of St. Charles, St. John the Baptist, and Tangipahoa.

Section 5. Sale of bonds; interest rates

The bonds may be sold at either public or negotiated sale in the manner and for such price as may be determined by the commission. The bonds shall bear interest at such rate or rates as are set for the in the resolution or ordinance authorizing the issuance of the bonds, but such interest rate or rates shall be governed by the provisions of R.S. 39:1424 and R.S. 39:1424.1.

Section 6. Publication of resolution; preemption

Any resolution authorizing the issuance of bonds shall be published one time in a newspaper of general circulation in the parish of Jefferson and in a newspaper of general circulation in the parish of St. Tammany; however, it shall not be necessary to publish any exhibits to such resolution if the same are available for public inspection and such fact is stated in the publication. For thirty days after the date of the last such publication, any person in interest may contest the legality of the resolution, any provision of the bonds to be issued pursuant thereto, the provisions therein made for the security and payment of such bonds and the validity of all other provisions and proceedings relating to the authorization and issuance of such bonds. After said thirty days, no person may contest the regularity, formality, legality, or effectiveness of the resolution, any provisions of the bonds to be issued pursuant thereto, the provisions for the security and payment of such bonds or the validity of any other provisions and proceedings relating to authorization and issuance of such bonds, for any cause whatever. Thereafter, it shall be conclusively presumed that

such bonds are legal and that every legal requirement for the issuance of such bonds has been complied with and no court shall have authority to inquire into any such matters after the lapse of said thirty days.

Section 7. Status of bonds as negotiable instruments; exemption from taxes; legal investments

All bonds issued pursuant to this Act shall be and are hereby made negotiable instruments within the meaning of and for all purposes of the negotiable instruments law of Louisiana, subject only to the provisions of the bonds for registration. All bonds and the income therefrom shall be exempt from all taxation by this state and any political subdivision thereof. The bonds shall be legal and authorized investments for banks, savings banks, insurance companies, homestead and building and loan associations, trustees and other fiduciaries and may be used for deposit with any officer, board, municipality or other political subdivision of this state, in any case where, by present or future laws, deposit or security is required.

Section 8. Use of proceeds of bonds

The proceeds of the sale of any bonds shall be deposited, applied, and disbursed in accordance with the provisions of the resolution authorizing the issuance of said bonds.

Section 9. Expressway part of state highway system; construction of expressway on state lands; restriction on construction of certain other crossings of Lake Pontchartrain

The following provisions of the Louisiana Constitution of 1921 relative to the rights, powers and privileges of the commission are hereby ratified, confirmed, approved, and continued in effect:

(1) The expressway has been constructed, extended, and/or improved, shall continue to be, and the same is hereby declared to be a part of the state highway system, and the state Department of Transportation and Development, or its successor, is authorized to enter into contracts with the commission for the operation and maintenance of the expressway and to construct, operate, and maintain approaches and connecting highways with the state highway system.

(2) The power and authority of the commission to improve and make additions to the expressway is hereby confirmed.

(3) The commission, acting on behalf of the parishes, shall continue to have the right and privilege to construct, operate, and maintain the expressway over, under, through, and across any state owned lands, surfaced or submerged, necessary therefor; provided that when all bonds issued by the commission shall have been fully paid in principal and interest, the expressway shall become the property of the state of Louisiana and shall thereafter be operated and maintained by the state Department of Transportation and Development as a toll-free project and as part of the state highway system.

(4) So long as any bonds issued by the commission are outstanding, neither the state of Louisiana nor any municipality, parish, political subdivision, or agency thereof nor any body under its control shall construct or permit the construction or operation of any vehicular bridge, causeway, tunnel, or ferry across Lake Pontchartrain at any point within ten miles of the expressway.

Section 10. Application of provisions

The powers and rights conferred by this Act shall be in addition to the powers and rights conferred by any other general or special law or the articles of incorporation of the commission. This Act does and shall be construed to provide a complete and additional method for the issuance of bonds. No proceeding, notice, or approval shall be required for the issuance of any bonds or any instrument as security therefor, except as provided herein. The provisions of this Act shall be liberally construed for the accomplishment of its purposes.

Section 11. Membership of the Commission

Beginning October 31, 1986, the commission shall be composed of five members appointed as follows:

(1) One member appointed from Jefferson Parish by the governor for a five-year term beginning November 1, 1986, upon recommendation by the Jefferson Parish Legislative Delegation.

(2) One member appointed from St. Tammany Parish by the governor for a five-year term beginning November 1, 1987, upon recommendation by the St. Tammany Parish Legislative Delegation.

(3) One member appointed from Jefferson Parish by the Jefferson Parish Council for a five-year term beginning November 1, 1988.

(4) One member appointed from St. Tammany Parish by the St. Tammany Parish Police Jury for a five-year term beginning November 1, 1989.

(5) One member appointed for a one-year term alternately from Jefferson Parish by the Jefferson Parish Council and from St. Tammany Parish by the St. Tammany Parish Police Jury. The member appointed for a one-year term beginning November 1, 1986, shall be appointed from Jefferson Parish.

Appointments made to replace members shall be made by the same appointing authority in the same manner and members shall remain on the commission until their replacement has been appointed and has taken office.

Section 12. The commission shall comply with the provisions of the "Louisiana Local Government Budget Act" (R.S. 39:1301-1315) to the same extent as political subdivisions of the state of Louisiana are required to comply therewith, and in addition thereto a copy of each annual budget shall, prior to adoption, be submitted to the Joint Legislative Committee on the Budget for review and approval.

Section 13. This Act shall become effective upon signature by the governor or, if not singed by the governor, upon expiration of the time for bills to become law

without signature by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana.

/s/ Sam Nunez
PRESIDENT OF THE SENATE

/s/ John Alario
SPEAKER OF THE HOUSE OF REPRESENTATIVES

/s/ Edwin Edwards
GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: 7-10-86

**1988 La. Acts 875**

ACT No. 875

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HOUSE BILL NO. 1553
BY REPRESENTATIVE DASTUGUE AND SENATOR LAURICELLA AND REPRESENTATIVE LANCASTER

AN ACT

To amend and reenact Sections 2, 4, and 11 of Act No. 762 of the 1986 Regular Session of the Louisiana Legislature relative to the Greater New Orleans Expressway Commission, to provide with respect to bond proceeds and the approval of the legislature for construction of improvements and betterments to the Greater New Orleans Expressway, to provide for the members of the commission, and to provide for related matters.

Notice of intention to introduce this Act has been published as provided by Article III, Section 13 of the Constitution of Louisiana.

Be it enacted by the Legislature of Louisiana:

Section 1. Sections 2, 4, and 11 of Act No. 762 of the 1986 Regular Session of the Louisiana Legislature are hereby amended and reenacted to read as follows:

Section 2. Authorization of bonds, budget approval

A. Notwithstanding any other laws of the state of Louisiana, the commission is hereby authorized and empowered with the approval of the State Bond Commission and the governing bodies of each of the parishes, to issue bonds as herein provided on behalf of the parishes for purposes of refunding, refinancing, restructuring,

extending, or unifying the whole or any part of its outstanding bonded indebtedness and to finance the cost of the construction of improvements and betterments to the expressway, including construction of approaches and access roads, bridges, overpasses, and any other structures and traffic safety facilities related to the expressway, and the costs of the issuance of the bonds. The bonds issued for the purpose of refunding, refinancing, restructuring, extending, or unifying the whole or any part of its outstanding bonded indebtedness shall be issued in an amount sufficient to provide the funds necessary to effectuate such purpose and to pay all costs associated therewith. The bonds issued for the purpose of constructing said improvements and betterments to the expressway may be issued in an amount not exceeding forty-nine million dollars ($49,000,000), exclusive of refunding bonds, provided, however, that the expenditure of any such bond proceeds shall require the prior approval of the House and Senate Committees on Transportation, Highways and Public Works, and the Joint Legislative Committee on the Budget. Bonds issued for the purpose of constructing improvements and betterments may be issued for the following specified projects indicated with the estimated costs for each being set forth opposite the particular project:

| | |
|---|---|
| Design and construct safety and capacity improvements, including a grade separation structure north of the North Toll Plaza in St. Tammany Parish | $10,000,000 |
| In Jefferson Parish, widen existing Causeway Boulevard at grade to six (6) lanes from Veterans | |

Memorial Boulevard to the Commission's South Toll Plaza, including right and left turning lanes, u-turns and crossovers to improve safety and capacity

$6,000,000

In Jefferson Parish, design and construct grade separation structures to provide safety and capacity improvements between Veterans Memorial Boulevard and the Commission's South Tool Plaza

$25,000,000

In Jefferson Parish, at I-10/Causeway Boulevard, redesign and upgrade existing interchange to improve safety and capacity by addition of elevated ramp structures connecting to Veterans Memorial Boulevard Overpass

$2,500,000

In Jefferson Parish, design and construct improvements to Causeway Boulevard to increase safety and capacity from Jefferson Highway to I-10.

$2,500,000

If additional funds are available they will be dedicated to the construction of breakdown bays and/or crossovers on the bridge, provided, however, that any such action shall require the approval of the House and Senate Committees on Transportation, Highways and Public Works, and the Joint Legislative Committee on the Budget.

Nothing herein contained shall prevent the commission from using any available monies obtained from sources other than bond proceeds to fund in whole or in

part any of the specified projects, and amount in excess of the estimated costs may be obtained from bond proceeds to complete a specified project. Bonds may be issued for other improvement projects approved by the commission and the governing bodies of each of the parishes, provided, however, that any such action shall require the approval of the House and Senate Committees on Transportation. Highways and Public Works, and the Joint Legislative Committee on the Budget.

B. Notwithstanding any other provision of law to the contrary, all proposed contracts and bonds to be issued after August 1, 1988 by the Greater New Orleans Expressway Commission shall be subject to the same oversight provisions as are required of agency rules and regulations under the provisions of the Louisiana Administrative Procedure Act and no such contract shall be entered into without such oversight and approval.

C. The Greater New Orleans Expressway Commission shall submit the annual operating budget to the Joint Legislative Committee on the Budget for its approval or rejection prior to any expenditure of funds contained in such budget.

* * *

Section 4. Security for bonds

The bonds may be secured in the same manner as the outstanding bonds, said outstanding bonds being payable from the tolls and other revenues derived from the operation of the expressway as supplemented by State Highway Fund No. 2 monies allocated exclusively to the parishes for the payment of bonds issued in connection

with the construction and improvement of the expressway or the refunding of such bonds. The dedication of State Highway Fund No. 2 monies to the payment of bonds of the commission and the parishes, which is authorized by and remains in effect under the Louisiana Constitution of 1974, is hereby reaffirmed and shall remain in effect until all bonds of the commission authorized heretofore and hereby have been paid in full or defeased, and there is hereby authorized to be pledged to the payment of such bonds the income and revenues derived from the operation of the expressway and the aforesaid State Highway Fund No. 2 monies.

The bonds also may be secured by a trust agreement by and between the commission and one or more corporate trustees, and may be further secured by credit enhancement devices, including, but not limited to, letters of credit, bank guarantees, municipal bond insurance, and any other cost effective device designed to improve the credit quality and marketability of securities. After the discharge and release of the Trust Agreement for Greater New Orleans Expressway dated as of January 1, 1967 securing the outstanding bonded indebtedness of the commission, any revenues of the commission remaining at the end of each fiscal year after (i) payment of all expenses of maintaining and operating the facilities of the commission and providing for necessary renewals and replacements thereof, and (ii) satisfaction of all obligations of the commission under the terms of any resolution, ordinance, or indenture authorizing the issuance of any bonds authorized in Section 2 of this Act, shall be considered surplus. This surplus shall be transferred at the end of each fiscal year to the treasurer of the state of

Louisiana for deposit in the state treasury. The first year surplus of three million dollars shall be transferred to the state treasury no later than January 1, 1987; provided, however, that prior to the transfer of such surplus to the state treasury, the commission shall use so much of said surplus as may be necessary for its officers to police the Huey P. Long Bridge and shall transfer fifty thousand dollars each fiscal year to each of the parishes of St. Charles, St. John the Baptist, and Tangipahoa, and provided further that any such action shall require the approval of the House and Senate Committees on Transportation, Highways and Public Works, and the Joint Legislative Committee on the Budget.

* * *

Section 11. Membership of the Commission

Beginning on the effective date of this Section, the commission shall be composed of five members appointed as follows:

(1) One member appointed from Jefferson Parish by the governor for a two-year term upon recommendation by the Jefferson Parish Legislative Delegation.

(2) One member appointed from St. Tammany Parish by the governor for a two-year term upon recommendation by the St. Tammany Parish Legislative Delegation.

(3) One member appointed form Jefferson Parish by the Jefferson Parish Council for a two-year term.

(4) One member appointed from St. Tammany Parish by the St. Tammany Parish Police Jury for a two-year term.

(5) One member appointed for a one-year term alternately from Jefferson Parish and from St. Tammany Parish, said appointments to be made by the governor upon the recommendation of the respective parish legislative delegation. The member appointed for a one-year term on the effective date of this Section, shall be appointed from Jefferson Parish.

All gubernatorial appointments shall be subject to Senate confirmation.

Appointments made to replace members shall be made by the same appointing authority in the same manner and members shall remain on the commission until their replacement has been appointed and has taken office.

No member shall serve more than two consecutive terms.

Section 2. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided in Article III, Section 18 of the Constitution of Louisiana.

Approved by the Governor, July 20, 1988.

Published in the Official Journal of the State:

August 15, 1988.

A true copy:

W. Fox McKeithen

Secretary of State

**1997 La. Acts 775**

ACT NO. 775
H.B. No. 578
MOTOR VEHICLES – PENALTIES; ALTERNATIVES TO CITATION – ADDITIONAL COST FOR CERTAIN CITATIONS ISSUED BY POLICE EMPLOYED BY GREATER NEW ORLEANS EXPRESSWAY COMMISSION

**Act 775**

BY REPRESENTATIVE WINDHORST

AN ACT to enact R.S. 32:57(G), relative to penalties when traffic citations are issued by police employed by the Greater New Orleans Expressway Commission; to provide for an additional cost to be added to the penalty in such cases; to create a Greater New Orleans Expressway Commission additional Cost fund; to provide for uses of monies in the fund; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

**Act 775, § 1**

Section 1. R.S. 32:57(G) is hereby enacted to read as follows:

§ 57. Penalties; alternatives to citation

* * *

G. (1) Notwithstanding any provision of law to the contrary, any person who is found guilty, pleads guilty, or pleads nolo contendere to any motor vehicle offense when the citation was issued for a violation on the Huey P. Long Bridge or the Lake Pontchartrain Causeway Bridge or approaches to and from such bridges by police

employed by the Greater New Orleans Expressway Commission shall pay an additional cost of five dollars.

(2) All proceeds generated by this additional cost shall be deposited into the state treasury. After compliance with the requirements of Article VII, Section 9(B) of the Constitution of Louisiana relative to the Bond Security and Redemption Fund, and prior to monies being placed in the state general fund, an amount equal to that deposited as required in this Subsection shall be credited to a special fund hereby created in the state treasury to be known as the Greater New Orleans Expressway Commission Additional Cost Fund. The monies in this fund shall be appropriated by the legislative to the Greater New Orleans Expressway Commission and shall be used by the commission to supplement the salaries of P.O.S.T. certified officers and for the acquisition or upkeep of police equipment. All unexpended and unencumbered monies in this fund at the end of the fiscal year shall remain in such fund. The monies in this fund shall be invested by the state treasurer in the same manner as monies in the state general fund and interest earned on the investment of monies shall be credited to this fund, again, following compliance with the requirements of Article VII, Section 9(B) of the Constitution, relative to the Bond Security and Redemption Fund. The monies appropriated by the legislature pursuant to this Paragraph shall not displace, replace, or supplant appropriations otherwise made from the general fund for the Greater New Orleans Expressway Commission.

Approved July 10, 1997.

(2)

FILED
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SUPREME COURT, U.S.

No. 98-472

In The

# Supreme Court of the United States

October Term, 1998

GREATER NEW ORLEANS
EXPRESSWAY COMMISSION,
DAVID HURSTELL; and JAMES DIGBY,

*Petitioners,*

*vs.*

ROBERT G. PENDERGRASS,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

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## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Table of Contents | i |
| Table of Cited Authorities | i |
| Reasons for Denying the Writ | 1 |
| Conclusion | 6 |


## TABLE OF CITED AUTHORITIES


**Statute:**

LSA-R.S. 33:1321, *et seq.* ..... 2

**United States Constitution:**

Eleventh Amendment ..... 1, 4

## REASONS FOR DENYING THE WRIT

This Brief in Opposition in reply to the Petition for Writ of Certiorari presently pending before this Honorable Court in the captioned matter is intended to simply and succinctly state those reasons in support of denying the subject Writ. And, most importantly, this Brief shall also address certain perceived misstatements of fact which undersigned counsel believes were intended to substantiate the issues alleged to be before this Honorable Court.

The Greater New Orleans Expressway Commission, David Hurstell and James Digby, Petitioners herein, have presented two (2) questions for review in their Petition. Both questions implicitly assume facts which are, in fact, misstatements of fact, and without the inclusion of which would cause Petitioners to fail in their burden of showing cause to accept this Writ. First, Petitioners request this Honorable Court to consider whether Causeway Police Officers should be afforded those same immunities which are afforded to Louisiana state troopers, namely, Eleventh Amendment Immunity. Inclusive in their first question presented is the modifying phrase

> . . . in light of the fact that they are commissioned by the Louisiana State Troopers acting on behalf of the Louisiana State Troopers, and patrolling portions of Louisiana State Highway System?

From the foregoing, one may easily perceive that the Petitioners were, in fact, determined to be acting on behalf of the State of Louisiana. Petitioners follow-up this phraseology by asserting on page 10 of their Writ that

> . . . The sole purpose of their commission was to act on behalf of the State of Louisiana — in the

> stead of Louisiana State Troopers, to patrol the Causeway Bridge as part of the State Highway System. . . .

These asserted facts are simply untrue. A review of the Decisions of both the Federal District and Fifth Circuit Court of Appeals clearly reflect that Officers Hurstell and Digby were not acting on behalf of the State of Louisiana, but were acting on behalf of the Greater New Orleans Expressway Commission ("GNOEC") which was determined to be a separate and distinct legal entity apart from the State of Louisiana; that it was neither an arm nor an agency of the State.

Petitioners are well aware that the factual premise upon which their first question is styled was adjudged by both lower courts to their prejudice. In their original Brief submitted to the Fifth Circuit Court of Appeals, Petitioners present their first issue as:

> Whether the Trial Court erred in finding that GNOEC was not an arm of the State of Louisiana, controlled by the State of Louisiana and performing a State function.

The Fifth Circuit Court of Appeals determined that the Trial Court was not in error, and for good reason. Again, it is not the intention of undersigned counsel to assert as arguments the reasons provided by the lower courts in their respective Decisions. However, it is helpful to mention certain factors that appear to be prominent in the decision of this issue, and which Petitioners understandably avoided.

More particularly, the GNOEC was incorporated in 1954 pursuant to LSA-R.S. 33:1321, *et seq.* ("the Local Services Law"). These statutes fall within that part of Louisiana's

Revised Statutes designated "Municipalities and Parishes". Its Articles of Incorporation have not been amended and are in effect this date. Among the many provisions contained therein which characterize the GNOEC as a private entity is reference to its origin, namely, that it was created as ". . . a body corporate and politic, as an agency and instrumentality of the Parishes of Jefferson and St. Tammany . . .".

Petitioners further emphasize that that GNOEC police officers are commissioned by the Office of State Police and the Louisiana Department of Public Safety and Permits. This circumstance has no relationship whatsoever to the nature of the GNOEC. Although it is true that each Officer of the GNOEC must be commissioned by the Department of Public Safety, such a commission is not peculiar to the GNOEC. More specifically, there exists no other authority in the State of Louisiana to provide such a commission (*see* Deposition of Robert B. Sutherlin, Rec. 402-403). Further, the State Police can commission any legal entity which seeks such authority, whether state, parish or private (*see* Deposition of Robert B. Sutherlin, Rec. 402-403). The Department of Public Safety also issues the State's citizens' driver's license. Does that infer that each citizen is acting on behalf of the State of Louisiana when operating his/her vehicle? The GNOEC's Officers are commissioned by the State to perform functions which require a form of licensure, but for the purpose of acting on behalf of the GNOEC. It is also interesting to note that our State Police are "civil service", whereas the GNOEC Police is not (*see* Deposition of Robert B. Sutherlin, Rec. 402).

Petitioners also emphasize that the Causeway Bridge has been designated as a portion of the Louisiana State Highway System. Considering that GNOEC Officers patrol the bridge, they conclude that these Officers are performing a State function. The State does not own the Bridge. The GNOEC owns

this Bridge. The GNOEC simply provides Officers to patrol property which it owns.

Respondent respectfully refers this Honorable Court to both Decisions rendered by the District and Appellate Courts and which are attached to Petitioners' Writ. A review of these Decisions provide the specific factual details upon which Petitioners' original Motion for Summary Judgment was denied. Petitioners assert that this Honorable Court should accept their Writ because

> The Fifth Circuit's refusal to extend Eleventh Amendment immunity to police officers who act on behalf of the state or state agencies sharply conflicts with decisions of the United States Court of Appeals for the Seventh Circuit

(at p. 13 of Petitioners' Writ). However, and again, this assertion is based upon the factual premise that GNOEC Officers act on behalf of the State or a State agency. Said factual premise was determined to be incorrect. Therefore, there exists no conflict as Petitioners allege.

The second question which Petitioners desire that this Honorable Court review is very much interrelated to its first question as hereinabove discussed. More particularly, it is asserted that the GNOEC is an arm of the State of Louisiana and, as such, to be protected by the Eleventh Amendment immunity. Both Lower Court Decisions discuss in detail those six (6) factors which have been utilized in determining whether a legal entity is an agency or arm of the State. Respondent respectfully refers to its previous argument relating to Petitioners' first question, and further relies upon the respective discussions of each lower court in their respective Decisions.

However, Petitioners have focused on the *effect* a judgment against the GNOEC might have upon the State of Louisiana. Their argument is misdirected. The size of a judgment is of no moment in this case. The GNOEC's Articles of Incorporation provide it with the right to sue and be sued. The GNOEC has never required the joinder of the State in any claim filed against it in State or Federal Court, nor has the State ever filed any suit on behalf of the GNOEC (*see* Deposition of Hunter O. Wagner, Jr., Rec. 349). Quite the contrary, the GNOEC has always acted as a separate legal entity suing, and being sued, in its own name only (*see* Deposition of Hunter O. Wagner, Jr., Rec. 350). The GNOEC finances its operation and maintenance of the bridge with self-generated income via toll revenues and bond investment income. Bonds which have been issued by the GNOEC do not constitute debts of the State, and the State does not guaranty the payment of these Bonds. The only money which the GNOEC receives from the State of Louisiana is derived from State Highway Fund No. 2. Further, these monies cannot be used to finance the operation and maintenance of the Causeway.

Most importantly, the GNOEC treats any liabilities resulting from monetary claims as an operating expense, and which claims are either paid by its insurer or through a fund which it has established for this purpose. Said "Self-Insurance Retention Fund" is, in effect, excess coverage over and above what insurance may not pay. Simply stated, the GNOEC is a self-supporting entity. There exists no documents whatsoever which guarantees the payment of GNOEC's debt by the State of Louisiana. And, in fact, no such claim has ever been so paid. Consequently, Petitioners' attempt to illustrate a conflict between the Fifth Circuit and this Court in terms of the payment of judgments should fail.

## CONCLUSION

Petitioners have attempted to convince this Honorable Court that there exists conflicts among the Federal Circuits allegedly created by this Fifth Circuit Decision. However, this assertion is based upon alleged facts which are unsupported and have proven to be untrue. Simply stated, the GNOEC is not an agency of the State, nor an arm thereof. It is a separate, clearly distinct legal entity. It owns the Causeway Bridge and employs police officers to patrol said Bridge. It maintains policies of insurance to pay liabilities of the nature which Respondent now claims. It has further established a Self-Insurance Retention Fund for excess coverage. This Fund is created by the GNOEC with its operating revenues and does not inure to the benefit of the State of Louisiana.

Consequently, and for those reasons as hereinabove set forth, it is respectfully submitted that there is no conflict between or among Circuits and this Court; that the Decision of the Fifth Circuit Court of Appeal is consistent with the six (6) tier test which has been utilized on many occasions in determining such an issue.

Respectfully submitted,

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